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“The Tricky Business of Administration Bonds”

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THE TRICKY BUSINESS OF ADMINISTRATION BONDS¹

As many of you may know, applying for an administration bond is not often the most expeditious or pleasant experience. Guarantee or bonding companies generally require detailed information to process the application. Delays are often incurred as a result of one query after the other being made by the bonding company, with the result at times being a rejection of the application. This often leads to one getting engaged again in a similar extended application process with another bonding company, with no guarantee of success.

It is no wonder, therefore, that it seems rather commonplace for applicants for a certificate of appointment of estate trustee to seek an order dispensing with a bond. This relief, however, has increasingly proven to be uncertain and, at times, difficult to obtain at first instance. Rejection rates on applications to dispense with the bond requirement are currently about 25%, with directions given to file further affidavit evidence.

This paper will consider a variety of questions relating to administration bonds, including:

- When is a bond needed and not needed?
- Who can and can not be a surety?
- What information is needed to apply for a bond?
- How does one avoid having to get a bond?
- How does one cancel a bond?

¹ The author gratefully acknowledges the assistance and contribution to this paper of Nadia Harasymowycz of Hull & Hull LLP.

What is an Administration Bond and What is its Purpose?

An administration bond is an obligation or a promise given to a court. It is a promise with a surety, offered by an application or required by a judge in an estate application filed with the court.

In allowing oneself to be personally liable in support of his/her actions as estate trustee, it is intended that any danger of the estate trustee misappropriating funds is eliminated. A bond is a therefore a vehicle by which the courts can protect the assets of the estate from rogue estate trustees.

The form of a bond (Form 74.32 of the *Rules of Civil Procedure*) includes the following language:

The principal as an estate trustee is required to prepare a complete and true inventory of all the property of the deceased, collect the assets of the estate, pay the debts of the estate, distribute the property of the deceased according to law, and render a complete and true accounting of these activities when lawfully required.

This provision makes it clear that the main purpose of an administration bond is to ensure that an estate trustee pays the debts of the estate and distributes the property of the estate to those who are entitled to it.

The Amount of an Administration Bond

Under the *Estates Act*, an administration bond is required to be double the amount of the assets as attested to in the application for probate². However, the *Estates Act* also allows for discretion in this regard. Specifically, it provides that it is within the judge's discretion to limit the

² *Estates Act*, R. S. O. 1990, c. E. 21, as amended, subsection 37(1).

liability of any single surety and direct that more than one bond is given³. Moreover, it permits the court "under special circumstances" to reduce or dispense with an administration bond.⁴

Various circumstances have been considered sufficient to justify a reduction in the amount of the administration bond.⁵ However, in cases where infant beneficiaries are involved the usual bond is normally required.⁶

Additionally, where the application for a certificate of appointment is being made by a succeeding estate trustee, the value of the administration bond does not need to be for the total value of the estate, but only for the value of the assets which remain in the estate.⁷

Similarly, if the party making the application for a certificate of appointment is seeking a resealing, the security required by bond is based only on the assets within the jurisdiction of the Province of Ontario.⁸

New or Additional Security

Where a surety for an administration or guardian dies or becomes insolvent, or where for any other reason the security furnished becomes inadequate, a judge may require other or additional security to be furnished. If it is not furnished, the grant of administration or guardianship may be revoked.⁹

³ *Ibid*, subsection 37(1).

⁴ *Ibid*, subsection 37(2).

⁵ For example, when the administration bond was required solely for the purpose of enabling compliance with certain legal formalities: Macdonell, Sheard and Hull on Probate Practice (4th Ed.) Toronto, Thomson Canada Limited (1996) at page 232 citing *Re Stacpoole* (1861), 2 Sw. & Tr. 316, 164 E.R. 1017; *Re Bowlby* (1876), 45 L.J.P. 100.

⁶ *Ibid* at page 233 citing *Re Luchetta*, [1919] 2 W.W.R. 885, 27 B.C.R. 337.

⁷ *Rules of Civil Procedure, Courts of Justice Act*, R.R. O. 1990, Reg. 194, Rule 74.11(1)(e).

⁸ *Ibid*, Rule 74.11(1)(f).

⁹ *Estates Act*, *supra* note 2 at subsection 40(1).

Substitution of Security

Where a surety for an administration or guardian desires to be discharged or wants to substitute the security given, a judge may allow other security to be provided and may direct that on the substituted security being furnished the surety will be being discharged.¹⁰ This type of application can be made without notice.¹¹

When is an Administration Bond Needed?

An administration bond is required where an application for a certificate of appointment without a will is made.¹² The bond shall be in the forms provided by the *Rules* (Forms 74.32 and 74.33 are attached). Although a bond is clearly required in such a situation, there are also other circumstances when it will be necessary to obtain:

- Where the deceased died with a will, but did not name an executor;¹³
- Where the named executor does not reside in Ontario or elsewhere in the Commonwealth, whether or not he/she was appointed under a will;¹⁴
- Where the application is for a certificate of appointment of a foreign estate trustee's nominee as estate trustee without a will;¹⁵
- Where the applicant is a succeeding estate trustee with a Will, and the estate trustee isn't named in the will;¹⁶ and
- Where the applicant is a succeeding estate trustee without a will.¹⁷

¹⁰ *Ibid*, subsection 41(1).

¹¹ *Ibid*, subsection 41(2).

¹² *Ibid*, section 35.

¹³ *Ibid*.

¹⁴ *Ibid*, section 6.

¹⁵ *Rules of Civil Procedure*, *supra* note 7 at Rule 74.05.1(1)(d).

¹⁶ *Ibid*, Rule 74.06.

In situations where the *Estates Act* does not indicate that an administration bond is required, any person who has a vested or contingent interest in an estate may move to have a bond filed or an existing bond increased or reduced.¹⁸

When is an Administration Bond Unnecessary?

Although there are circumstances in which an administration bond is required, in the appropriate circumstance one may be exempt from obtaining a bond, including:

- When an application to act as estate trustee is made by the Government of Ontario or any Ministry thereof, or any Provincial Commission or Board created under any *Act* of the legislature;¹⁹
- When, on an intestacy, the surviving spouse applies for a certificate of appointment of estate trustee without a will, the value of the estate does not exceed the preferential share and an affidavit is filed setting out the debts of the estate;²⁰
- When a trust corporation is appointed as estate trustee;²¹ and
- When one successfully applies to the court for an order dispensing with the requirement to post a bond.²²

The process by which one may successfully seek to dispense with the requirement to post an administration bond is addressed later on in this paper. The Court has recently spoken to its concerns regarding this issue, and has set out the appropriate steps an individual ought to take in order to ensure that the court is able to make an informed and proper decision.

¹⁷ *Ibid*, Rule 74.07.

¹⁸ *Ibid*, Rule 74.11(2).

¹⁹ *Estates Act*, *supra* note 2 at subsection 36 (1).

²⁰ *Ibid*, subsection 36(2).

²¹ *Loan and Trust Corporation Act*, R.S.O. 1990, c. L.25, subsection 175(4).

²² *Estates Act*, *supra* note 2 at subsection 37(2).

Who Can be a Surety?

Rule 74.11 of the *Rules of Civil Procedure* outlines the requirements for a surety. Specifically prohibited are registrars²³ and solicitors²⁴, as well as minors²⁵. In addition, if the surety is an individual he or she must be resident in Ontario.²⁶

If the value of an estate is \$100,000 or less, one surety will suffice.²⁷

What Requirements Must One Meet to Obtain an Administration Bond?

An application for an administration bond does not have specific legal requirements. However, full disclosure of estate assets and liabilities, as well as full disclosure of personal liabilities are generally considered to be a minimum requirement by bonding agencies in order to have the administration bond issued.

Once the application has been made to the bonding agency, the review process will determine if any additional information is needed. Administration bond applications likely require such detailed disclosure because the surety remains liable until the estate trustee has fully accounted to the beneficiaries.²⁸

Even when a fulsome application is made to a bonding company, an administration bond may not be granted for reasons unrelated to the assets and liabilities disclosed. These reasons could include that the minor beneficiary of the estate is young enough that the estate will need to remain open for a lengthy period of time. This may deter the guarantee company from issuing the bond, as the length of time may cause concern for its need to have access to

²³ *Rules of Civil Procedure*, *supra* note 7 at Rule 74.11(1)(b).

²⁴ *Ibid*, Rule 74.11(1)(b).

²⁵ *Ibid*, Rule 74.11(1)(c).

²⁶ *Ibid*, Rule 74.11(1)(c).

²⁷ *Ibid*, Rule 74.11(1)(d).

²⁸ Probate Practice, *supra* note 5 at page 231, citing *Harvell v. Foster* [1954] 2 Q.B. 367 (C.A).

information regarding the bonded estate trustee. This same situation may arise in the circumstance of a lifetime trust where the estate trustee may be responsible for the estate for a lengthy period of time. Alternatives, including the appointment of a trust company, may be advisable in such situations.

Assignment of a Bond

A judge can order the registrar to assign a bond to some other person upon being satisfied that the condition of the bond has been broken.²⁹ This type of application should be brought on notice to the sureties.³⁰

Cancellation of Security

The administration bond generally remains in the custody of the Court until cancelled.³¹

Where an executor has passed their final accounts and has paid into court or distributed the whole of the property of the deceased, the judge may direct the bond or other security to be delivered up to be cancelled.³²

Alternatively, where an executor produces evidence to the satisfaction of the judge that the debts of the deceased have been paid and the residue distributed, the judge may order that the bond or other security be cancelled.³³ This procedure is often followed, as it obviates the need to pass accounts, the expense of which is often not justified.

²⁹ *Estates Act*, supra note 2 at section 38.

³⁰ *Probate Practice*, supra note 5 at page 233, citing *Re Hill* (1868), 1 Chy. Chrs. 386. For a much more fulsome commentary on this issue I refer you to Chapter Ten of this text.

³¹ *Ibid*, page 233, citing *Re Clark* [1955] O.W.N. 383 (C.A.).

³² *Estates Act*, supra note 2 at section 42.

³³ *Ibid*, section 43.

The application is usually made without notice upon the affidavit showing:

- That the debts have been paid;
- Proof of advertisement for creditors or an explanation as to why no such advertisement was made;
- The manner in which the residue was distributed;
- Verification that the beneficiaries released the estate; and
- Whether minors or mental incompetents are involved (and the proper notice given as further particularized below).

Where a minor was or is entitled to a part of the estate under the distribution, an order cancelling a bond shall not be made without notice to The Children's Lawyer.³⁴ Similarly, where a person who is a patient in a psychiatric facility under the *Mental Health Act* was or is entitled to a part of the estate under the distribution, an order cancelling a bond shall not be made without notice to Public Guardian and Trustee.³⁵

How Does One Secure the Dispensation of an Administration Bond?

As noted above, the main purpose for a bond is to ensure that an estate trustee pays the estate's debts and distributes the estate's assets. It follows, therefore, that when one is seeking to dispense with a bond, one must satisfy the court that the protection afforded by it is not required or will be otherwise met.

As noted above, the court has the discretion under "special circumstances" to reduce the amount of the administration bond, or dispense with the bond all together. However, there is no direction as to what is meant by "special circumstances". The *Rules of Civil Procedure* similarly offer little or no guidance with respect to what information must be before the court.

³⁴ *Ibid.*

³⁵ *Ibid.*

Parties often seek to dispense with the administration bond as a result of the inconvenience, cost and/or difficulty connected with trying to obtain a bond. Until recently, the result of such application has been hard to predict. However, it seems that more often than not the Courts have readily enough granted this request.

In a Recent Ontario Superior Court of Justice decision, *Re Henderson Estate*³⁶ (attached), The Honourable Justice David M. Brown has attempted to do away with or, at a minimum, reduce uncertainty and unpredictability in this area.

Brown J. noted retired Justice Haley's succinct comment on the issue, being that a bond is usually dispensed with "if all beneficiaries are *sui juris* and consent to the order AND all debts have been paid or the affidavit lists the debts and the judge is satisfied the creditors are protected".³⁷

His Honour went on to articulate guidelines for what should be included in the affidavit filed in support of an application for a certificate of appointment as estate trustee and for an order dispensing with the need for an administration bond. Specifically, the supporting affidavit should include:

- i) The identity of all beneficiaries of the estate;
- (ii) The identity of any beneficiary of the estate who is a minor or incapable person;
- (iii) The value of the interest of any minor or incapable beneficiary in the estate;

³⁶ 2008 WL 5456428 (Ont. S.C.J.), 2008 CarswellOnt 8065, 45 E.T.R. (3d) 189.

³⁷ *Ibid*, para. 11.

- (iv) Signed consents of *sui juris* beneficiaries - if consents cannot be obtained from all the beneficiaries, the applicant must explain how he or she intends to protect the interests of those beneficiaries);
- (v) The last occupation of the deceased;
- (vi) Evidence as to whether all the debts of the deceased have been paid, including any obligations under support agreements or orders;
- (vii) Evidence as to whether the deceased operated a business at the time of death and, if the deceased did, whether any debts of that business have been or may be claimed against the estate, and a description of each debt and its amount; and
- (viii) If all the debts have not been paid, evidence of the value of the assets of the estate, the particulars of each debt (amount and name of creditor) and an explanation as to what arrangements have been made to pay those debts or as to what security the applicant proposes to put in place in order to protect those creditors.³⁸

Although one might think that these requirements fully encompass many of the steps which are necessary for the individual applying to be estate trustee to explore, the detail required as part of an affidavit filed on behalf of the applicant to dispense with an administration bond is not to be considered lightly.

In *Re Henderson*, the Court did not dispense with the need for an administration bond. It was determined that the affidavit, which read "all debts of the estate will be fully paid and satisfied out of the estate assets" was not sufficient to satisfy the court in order to dispense with the

³⁸ *Ibid*, para 12.

requirement for an administration bond.³⁹ It was similarly insufficient to assert: "To the best of my knowledge and belief all creditors have been determined and there are sufficient assets to pay all claims against the estate"⁴⁰.

In *Re Henderson*, Justice Brown indicates that a draft order should be filed with the court in addition to the affidavit in support of the dispensation of the administration bond. The order should read as follows:

"THIS COURT ORDERS that the posting of an administration bond by the Estate Trustee is dispensed with."

Brown J. recently provided a standard form Endorsement (attached) for use by the judges on the Toronto Estates List in order to deal with the issue of dispensing with bonds, which Endorsement tracks the guidelines set out in *Re Henderson*.

The *Re Henderson* decision should mark the beginning of greater consistency and less discrepancy in content between applications to the court for certificates of appointment as estate trustee and for orders seeking to dispense with an administration bond.

³⁹ *Ibid*, paras 16 and 17.

⁴⁰ *Ibid*, paras 18 and 19 (*Re: Estate of Eugenia Zagaglia*: 01-3835/08).

FORM 74.32
Courts of Justice Act
BOND — INSURANCE OR GUARANTEE COMPANY
ONTARIO
SUPERIOR COURT OF JUSTICE

BOND NO.

AMOUNT: \$

IN THE ESTATE OF *(insert name)*, deceased.

The principal in this bond is *(insert name)*

The surety in this bond is *(insert name)*, an insurer licensed under the *Insurance Act* to write surety and fidelity insurance in Ontario.

The obligee in this bond is the Accountant of the Superior Court of Justice acting for the benefit of creditors and persons entitled to share in the estate of the deceased.

The principal and the surety bind themselves, their heirs, executors, successors and assigns jointly and severally to the Accountant of the Superior Court of Justice in the amount of Dollars (\$.....).

The principal as an estate trustee is required to prepare a complete and true inventory of all the property of the deceased, collect the assets of the estate, pay the debts of the estate, distribute the property of the deceased according to law, and render a complete and true accounting of these activities when lawfully required.

The primary obligation under this bond belongs to the principal. The principal is liable under this bond for any amount found by the court to be owing to any creditors of the estate and persons entitled to share in the estate to whom proper payment has not been made.

The surety, provided it has been given reasonable notice of any proceeding in which judgment may be given against the principal for failure to perform the obligations of this bond shall, on order of the court, and on default of the principal to pay any final judgment made against the principal in the proceeding, pay to the obligee the amount of any deficiency in the payment by the principal, but the surety shall not be liable to pay more than the amount of the bond.

The amount of this bond shall be reduced by and to the extent of any payment made under the bond pursuant to an order of the court.

The surety is entitled to an assignment of the rights of any person who receives payment or benefit from the proceeds of this bond, to the extent of such payment or benefit received.

DATE

SIGNED, SEALED AND DELIVERED

in the presence of:

.....
Principal

.....
Surety

RCP-E 74.32 (November 1, 2005)

FORM 74.33
Courts of Justice Act
BOND — PERSONAL SURETIES
ONTARIO
SUPERIOR COURT OF JUSTICE

BOND NO.

AMOUNT: \$

IN THE ESTATE OF *(insert name)*, deceased.

The principal in this bond is *(insert name)*

The sureties in this bond are *(insert names)*

The obligee in this bond is the Accountant of the Superior Court of Justice acting for the benefit of creditors and persons entitled to share in the estate of the deceased.

The principal and the sureties bind themselves, their heirs, executors, successors and assigns jointly and severally to the Accountant of the Superior Court of Justice in the amount of Dollars (\$.....).

The principal as an estate trustee is required to prepare a complete and true inventory of all the property of the deceased, collect the assets of the estate, pay the debts of the estate, distribute the property of the deceased according to law, and render a complete and true accounting of these activities when lawfully required.

The primary obligation under this bond belongs to the principal. The principal is liable under this bond for any amount found by the court to be owing to any creditors of the estate and persons entitled to share in the estate to whom proper payment has not been made.

The sureties, provided they have been given reasonable notice of any proceeding in which judgment may be given against the principal for failure to perform the obligations of this bond shall, on order of the court, and on default of the principal to pay any final judgment made against the principal in the proceeding, pay to the obligee the amount of any deficiency in the payment by the principal, but the sureties shall not be liable to pay more than the amount of the bond.

The amount of this bond shall be reduced by and to the extent of any payment made under the bond pursuant to an order of the court.

The sureties are entitled to an assignment of the rights of any person who receives payment or benefit from the proceeds of this bond, to the extent of such payment or benefit received.

DATE

SIGNED, SEALED AND DELIVERED
in the presence of:

.....
Principal

.....
Surety

.....
Surety

AFFIDAVIT OF SURETY

I, *(insert name)*, of *(insert city or town and county or district, metropolitan or regional municipality of residence)*, make oath and say/affirm:

I am a proposed surety on behalf of the intended estate trustees of the property of *(insert name)*, deceased, named in the attached bond.

I am eighteen years of age or over and own property worth \$..... over and above all encumbrances, and over and above what will pay my just debts and every sum for which I am now bail or for which I am liable as surety or endorser or otherwise.

SWORN/AFFIRMED BEFORE)
me at the of)
in the of)
this day of , 20 .)
)
)
)
)
)
)

.....
A Commissioner for Taking Affidavits (or as may be)

AFFIDAVIT OF SURETY

I, (insert name), of (insert city or town and county or district, metropolitan or regional municipality of residence), make oath and say/affirm:

I am a proposed surety on behalf of the intended estate trustees of the property of (insert name), deceased, named in the attached bond.

I am eighteen years of age or over and own property worth \$..... over and above all encumbrances, and over and above what will pay my just debts and every sum for which I am now bail or for which I am liable as surety or endorser or otherwise.

SWORN/AFFIRMED BEFORE)
the at the of)
in the of)
this day of , 20 .)
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.....
A Commissioner for Taking Affidavits (or as may be)

2008 WL 5456428 (Ont. S.C.J.), 2008 CarswellOnt 8065, 45 E.T.R. (3d) 189

C
2008 CarswellOnt 8065

Henderson Estate, Re

In the Estate of Robert James Henderson

In the Estate of Eugenia Zagaglia

Cour supérieure de l'Ontario

D.M. Brown J.

Heard: 11 Décembre 2008

Judgment: Décembre 16, 2008

Docket: 01-4100/08, 01-3835/08

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Counsel: A.D. Fleming for Applicant for a Certificate of Appointment of Estate Trustee without a Will in 01-4100/08

A. Reino for Applicant for a Certificate of Appointment of Estate Trustee without a Will in 01-3835/08

Subject: Estates and Trusts

Estates and trusts --- Estates -- Grant of probate or letters of administration -- Application for grant of administration
-- Administration bond

When applicant for certificate of appointment of estate trustee makes request under s. 37(2) of Estates Act for order that judge dispense with requirement to post administration bond, applicant should file affidavit identifying all beneficiaries of estate including any minor or incapable person and state value of interest of any minor or incapable beneficiary -- There should be executed consents from all beneficiaries who are sui juris to appointment of estate trustee and to order dispensing with administration bond -- If consents cannot be obtained from all beneficiaries, applicant must explain how he or she intends to protect interests of those beneficiaries by way of posting of security or otherwise -- Affidavit should also state occupation of deceased and give evidence as to whether all debts of deceased have been paid, including any obligations under support agreements or orders -- There should also be evidence as to whether deceased operated business at time of death and if so, whether any debts of business have been or may be claimed against estate, and description and amount of each debt -- If all debts of estate have not been paid, affidavit should contain evidence of value of assets of estate, particulars of each debt and explanation of arrangements made with those creditors to pay their debts -- Also, there should be evidence of what security applicant proposes to put in

2008 WL 5456428 (Ont. S.C.J.), 2008 CarswellOnt 8065, 45 E.T.R. (3d) 189

place in order to protect those creditors -- Any exhibits, consents or other documents referred to in affidavit should be attached, and copies of draft order filed separately.

Statutes considered:

Estates Act, R.S.O. 1990, c. E.21

Generally -- referred to

s. 6 -- referred to

s. 35 -- considered

s. 36(1) -- considered

s. 36(2) -- considered

s. 37(1) -- considered

s. 37(2) -- considered

Loan and Trust Corporations Act, R.S.O. 1990, c. L.25

s. 175(4) -- considered

Succession Law Reform Act, R.S.O. 1990, c. S.26

Generally -- referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally -- referred to

R. 74.05.1(1)(d) [en. O. Reg. 332/96] -- referred to

R. 74.06 [en. O. Reg. 484/94] -- referred to

R. 74.07 [en. O. Reg. 484/94] -- referred to

R. 74.11(2) [en. O. Reg. 484/94] -- considered

Forms considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

2008 WL 5456428 (Ont. S.C.J.), 2008 CarswellOnt 8065, 45 E.T.R. (3d) 189

Form 74.32 [en. O. Reg. 484/94] -- referred to

APPLICATION by estate trustee for order dispensing with posting of administration bond.

D.M. Brown J.:

I. The Problem: The lack of clarity surrounding filing requirements for requests to dispense with administration bonds

1 Each week the judge sitting on the Toronto Estates List is asked to consider up to two dozen requests by applicants for certificates of appointment of estate trustee for orders dispensing with the posting of an administration bond. Each week the judge rejects a significant number of those requests because of deficiencies in the filed materials.

2 This is a source of frustration, both for the Bench, who spend time reviewing materials that turn out to lack key information and, no doubt, for the Bar, who cannot find guidance in the *Estates Act* or the *Rules of Civil Procedure* about the proper materials to file in support of such a request.

3 This situation means that members of the public are not receiving the level of service to which they are entitled on an issue which affects many families in this city -- the need to obtain certificates of appointment by persons of modest means for estates with modest assets.

4 In my view this is an area where strong consideration should be given to amending the *Rules of Civil Procedure* to provide filing directions for requests to dispense with administration bonds. In the meantime, I have before me two such requests where further evidence must be put before the court. I therefore wish to review briefly the rationale underpinning the statutory requirement for an administration bond and then to set out filing guidelines for making such requests on the Toronto Region Estates List.

II. The statutory requirement for administration bonds

5 Section 35 of the *Estates Act* provides:

35. Except where otherwise provided by law, every person to whom a grant of administration, including administration with the will annexed, is committed shall give a bond to the judge of the court by which the grant is made, to enure for the benefit of the Accountant of the Superior Court of Justice, with a surety or sureties as may be required by the judge, conditioned for the due collecting, getting in, administering and accounting for the property of the deceased, and the bond shall be in the form prescribed by the rules of court, and in cases not provided for by the rules, the bond shall be in such form as the judge by special order may direct.

6 This statutory requirement for the posting of a bond most frequently arises in two situations -- where a person dies intestate and an application is made for a certificate of appointment of estate trustee without a will, or where a person dies testate, but the will does not name an executor and an application is made for a certificate of appointment of estate trustee with a will. (The posting of a bond is also required in the cases of a foreign executor [*Estates Act*, s. 6], a foreign estate trustee's nominee as estate trustee without a will [Rule 74.05.1(1)(d)], and a succeeding trustee with a will where the sole or only surviving estate trustee has died and the will makes no provision for someone else to be appointed [Rules 74.06 and 74.07]).

7 Exemptions exist to the requirement. Section 36(1) of the Act exempts the Government of Ontario, any ministry

2008 WL 5456428 (Ont. S.C.J.), 2008 CarswellOnt 8065, 45 E.T.R. (3d) 189

or any provincial commission or board from the requirement to post a bond, and section 36(2) also dispenses with the need for a bond where the administration on an intestacy is granted to the surviving spouse of the deceased, the net value of the estate does not exceed the preferential share of \$200,000 presently prescribed under the *Succession Law Reform Act*, and there is filed with the application for administration an affidavit setting out the debts of the estate. Also, section 175(4) of the *Loan and Trust Corporations Act*, R.S.O. 1990, c. L.25, exempts from the requirement of a bond a registered and approved trust company that applies for appointment as estate trustee.

8 Section 37(1) specifies the amount of the bond -- double the amount under which the property of the deceased has been sworn -- and then section 37(2) provides:

The judge may at any time under special circumstances reduce the amount of or dispense with the bond.

9 The *Estates Act* does not articulate the factors that a judge should take into account when considering a request to dispense with a bond, but those factors can be gleaned from the language of the bond prescribed by Form 74.32 of the *Rules of Civil Procedure* which imposes the following obligations on the estate trustee:

The principal as an estate trustee is required to prepare a complete and true inventory of all the property of the deceased, collect the assets of the state, pay the debts of the estate, distribute the property of the deceased according to law, and render a complete and true accounting of these activities when lawfully required. (emphasis added)

As well, Rule 74.11(2) permits a person who has a contingent or vested interest in an estate, including a creditor, to move for an order that an estate trustee, or applicant for appointment, file a bond.

10 These provisions make clear that the main purpose of an administration bond is to ensure that an estate trustee pays the debts of the estate and distributes the property of the estate to those who are entitled to it. It follows, therefore, that an applicant for a certificate of appointment who seeks an order dispensing with the posting of an administration bond must satisfy the court, by way of evidence, that the protection afforded by a bond to beneficiaries and creditors is not required or will be met in some other way.

III. Filing Guidelines for Requests to Dispense with Administration Bonds

11 How can an applicant so satisfy the court? Retired Justice Haley put the matter succinctly in materials which she prepared for judges in 2005:

A bond may be dispensed with by judge's order pursuant to section 37(2) of the *Estates Act*. This is usually done if all beneficiaries are *sui juris* and consent to the order AND all debts have been paid or the affidavit lists the debts and the judge is satisfied the creditors are protected.

That, in a nutshell, is what an applicant seeking to dispense with an administration bond must demonstrate, by way of evidence, to a judge.

A. The content of the affidavit in support

12 Accordingly, when an applicant for a certificate of appointment of estate trustee makes a request under section 37(2) of the *Estates Act* for an order that a judge dispense with the requirement to post an administration bond, the applicant should file affidavit evidence in support of the request which contains the following:

- (i) The identity of all beneficiaries of the estate;

- (ii) The identity of any beneficiary of the estate who is a minor or incapable person;
- (iii) The value of the interest of any minor or incapable beneficiary in the estate;
- (iv) Executed consents from all beneficiaries who are *sui juris* to the appointment of the applicant as estate trustee and to an order dispensing with an administration bond should be attached as exhibits to the affidavit. If consents cannot be obtained from all the beneficiaries, the applicant must explain how he or she intends to protect the interests of those beneficiaries by way of posting security or otherwise;
- (v) The last occupation of the deceased;
- (vi) Evidence as to whether all the debts of the deceased have been paid, including any obligations under support agreements or orders;
- (vii) Evidence as to whether the deceased operated a business at the time of death and, if the deceased did, whether any debts of that business have been or may be claimed against the estate, and a description of each debt and its amount;
- (viii) If all the debts of the estate have not been paid, evidence of the value of the assets of the estate, the particulars of each debt -- amount and name of creditor -- and an explanation of what arrangements have been made with those creditors to pay their debts and what security the applicant proposes to put in place in order to protect those creditors.

B. The form of the affidavit in support

13 A practice has grown up in Toronto that those requesting an order dispensing with an administration bond simply file a bunch of loose documents, including consents, affidavits and draft orders. Some organization needs to be brought to the materials filed. At a minimum, an applicant for a certificate who requests an order dispensing with an administration bond should file an affidavit that addresses the matters enumerated in paragraph 12 above and to which are attached, as exhibits, any consents or other documents referred to in the affidavit. Copies of the draft order should be separately filed.

C. Content of order

14 The operative language of the draft order filed with the affidavit in support should read as follows:

THIS COURT ORDERS that the posting of an administration bond by the Estate Trustee is dispensed with.

D. Concluding comments

15 If the applicant files this evidence in support of its request to dispense with an administration bond, the judge considering the motion will possess a fulsome record upon which to determine whether to dispense with a bond, either entirely or on terms. By setting down these filing guidelines I hope to reduce the number of requests under section 37(2) of the *Estates Act* which are rejected because of deficiencies in the affidavit material, and thereby provide the public with a more expeditious judicial determination of such requests.

IV. The particular applications before me

2008 WL 5456428 (Ont. S.C.J.), 2008 CarswellOnt 8065, 45 E.T.R. (3d) 189

Estate of Robert James Henderson: 01-4100/08

16 Paragraph 9 of the affidavit in support reads: "All debts of the estate will be fully paid and satisfied out of the estate assets." This evidence is insufficient to grant the order sought.

17 Accordingly, I reject the request to dispense with an administration bond and request the applicant to file a further affidavit addressing the points set out in 12 above, in particular paragraph 12 (viii).

Estate of Eugenia Zagaglia: 01-3835/08

18 Paragraph 7 of the affidavit in support reads: "To the best of my knowledge and belief all creditors have been determined and there are sufficient assets to pay all claims against the estate." This evidence too is insufficient.

19 I reject the request to dispense with an administration bond and request the applicant to file a further affidavit addressing the points set out in 12 above, in particular paragraph 12 (viii).

Order accordingly.

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SUPERIOR COURT OF JUSTICE

ESTATE FILE NO: 01- _____

IN THE MATTER OF THE ESTATE OF: _____

ENDORSEMENT

- Order to go dispensing with the filing of an administration bond.
- Request rejected; applicant to file further affidavit addressing the following:
 - Identity of all beneficiaries of the estate;
 - Identity of any beneficiary of the estate who is a minor or incapable person;
 - Value of the interest of any minor or incapable beneficiary in the estate;
 - Executed consents from all beneficiaries who are *sui juris* to the appointment of the applicant as estate trustee and to an order dispensing with an administration bond. If consents cannot be obtained from all the beneficiaries, the applicant must explain how he or she intends to protect the interests of those beneficiaries by way of posting security or otherwise;
 - Last occupation of the deceased;
 - Evidence as to whether all the debts of the deceased have been paid, including any obligations under support agreements or orders;
 - Evidence as to whether the deceased operated a business at the time of death and, if the deceased did, whether any debts of that business have been or may be claimed against the estate, and a description of each debt and its amount;
 - If all the debts of the estate have not been paid, evidence of the value of the assets of the estate, the particulars of each debt - amount and name of creditor - and an explanation of what arrangements have been made with those creditors to pay their debts and what security the applicant proposes to put in place in order to protect those creditors.
- Other:

Date

Judge

<p>Copy sent to Applicant on _____ By _____ By ___ Mail ___ Fax ___ Picked Up</p>
